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MEMORANDUM OF LAW

DATE: February 7, 1997

NAME: Ed Ryan, City Auditor & Comptroller

FROM: City Attorney

SUBJECT: Authority for Issuance of Auditor's Certificate for Stadium Construction Contract

QUESTION PRESENTED

In light of the controversy concerning the status of the December 10, 1996, amendments to the 1995 agreements between the City of San Diego ("City") and San Diego Chargers ("Chargers"), the City Auditor and Comptroller has asked under what authority and circumstance may an Auditor's Certificate issue for the \$55 million construction contract, awarded by the Public Facilities Financing Authority ("PFFA") to Nielsen-Dillingham Builders, for work at San Diego Jack Murphy Stadium ("Stadium")?¹

SHORT ANSWER

An Auditor's Certificate is only required to certify that sufficient money is in the treasury of the City, and that an appropriation has been made and not exhausted, for a public works contract. If an appropriation for the original \$60 million expenditure contemplated in the 1995 agreement with the Chargers has been made and not exhausted, and money is in the treasury for

¹For purposes of the Stadium expansion, you are acting in your capacity as Auditor and Comptroller for the PFFA, which, as explained below, is the contracting agency for the work at the Stadium. While PFFA is not subject to the restrictions of the San Diego City Charter (City v. Rider, 47 Cal. App. 4th 1473 (1996), rev. den.), in an abundance of caution you have asked us to analyze the question presented based upon your role as Auditor and Comptroller for the City as PFFA's monies for the Stadium project are deposited with the City. This analysis is not an admission that the provisions of the Charter apply to PFFA. Your authority as Auditor for PFFA is not as specifically restricted as your authority as Auditor for the City.

that purpose, an Auditor's Certificate may issue for that construction contract. An Auditor's Certificate may issue under those circumstances for any amount for which those conditions exist irrespective of the effectiveness of any agreement with the Chargers.

FACTS

In May of 1995 the City Council approved new agreements with the Chargers for the use and occupancy of Stadium. Those agreements called, in part, for the City to spend \$60 million to expand and improve the Stadium. To accomplish this work, the City entered into several agreements with PFFA by which PFFA leased the Stadium, issued bonds for the expansion, awarded the construction contract, and leased the Stadium back to the City. In early 1996, PFFA authorized the award of the construction contract in the amount of approximately \$38 million. This amount was later amended to \$55 million, subject to available funds. PFFA has issued \$60 million worth of bonds, which proceeds are on deposit with the City. These actions have all been validated, either by court action or the failure on the part of third parties to take timely court action, and no referendum on them has occurred. An appropriation up to \$78 million has been made in the FY 97 Appropriation Ordinance for the Stadium work.

ANALYSIS

San Diego City Charter ("Charter") sections 39, 80 and 82 set forth the duties of the Auditor concerning what is commonly known as an "Auditor's Certificate." In relevant part, Charter section 39 states:

No contract, agreement, or other obligation for the expenditure of public funds shall be entered into by any officer of the City and no such contract shall be valid unless the Auditor and Comptroller shall certify in writing that there has been made an appropriation to cover the expenditure and that there remains a sufficient balance to meet the demand thereof.

Similarly, Charter section 80 provides in part:

No contract, agreement, or other obligation, involving the expenditure of money out of appropriations made by the Council in any one fiscal year shall be entered into, nor shall any order for such expenditure be valid unless the Auditor and Comptroller shall first certify to the Council that the money required for such contract, agreement or obligation for such year is in the treasury to the credit of the appropriation from which it is to be drawn and that it is otherwise unencumbered.

Finally, Charter section 82 provides in part:

The Auditor and Comptroller . . . shall issue no warrant or check-warrant for payment unless he finds . . . that an appropriation has been made therefore which has not been exhausted; and that there is money in the treasury to make payment.

The import of these provisions is that the duty of the Auditor is to certify two things for an expenditure: 1) that an appropriation has been made that has not been exhausted; and, 2) that sufficient money is in the treasury to make the payment. No other condition must be satisfied for an expenditure of money. It is thus our opinion that, in the case of a public works project that is financed with lease-revenue bonds, the Auditor need not certify that the necessary revenue to finance the debt will be available in the future in order for an Auditor's Certificate to issue for the expenditure of bond proceeds actually in the treasury to the credit of an appropriation. Future appropriations for the repayment of debt are not the responsibility of the Auditor, but rather the City Council.

This conclusion is confirmed by language in Charter section 74. That section provides generally that the Council must make an appropriation each year for repayment of the City's debt. If the Council does not, the Auditor is authorized to set up an appropriation account and transfer sufficient funds into that account each year for that purpose.

In this case, an appropriation of up to \$78 million has been made for the Stadium project, based on anticipated debt financing. The Auditor has also been authorized to borrow from other accounts to the credit of that appropriation. Finally, lease-revenue bonds have been sold by PFFA, and the proceeds deposited with the City in the amount of \$60 million. Thus, an Auditor's Certificate may issue for any amount, up to \$78 million, based upon the presence of \$60 million in the City's treasury or based upon available funds to be borrowed to the credit of the appropriation, irrespective of the existence of the revenue source to make debt service payments in the future. The existence of such a revenue source is not the Auditor's responsibility; it is the responsibility of the Council. The Auditor will be authorized to set up the appropriate account in the future if the Council does not make the required appropriation from available revenue.

CONCLUSION

An Auditor's Certificate may issue for the construction contract at the Stadium if sufficient money is in the treasury of the City to make the expenditure, up to the amount of any appropriation. There exists \$60 million in bond proceeds in the treasury for an appropriation up to \$78 million, and you are authorized to borrow from other available funds to the credit of that appropriation. An Auditor's Certificate may issue accordingly.

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By

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